Case Acquisition Corporation d/b/a W. R. Case & Sons Cutlery Co. *and* Local Lodge #638, District Lodge #65, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 6–CA–23398

July 23, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The central issue in this case[1] is whether the judge correctly found that the Respondent lawfully failed to hire three union activists and delayed hiring another union activist from its predecessor's work force. Based on this finding, the judge found that there was no unlawful taint to a petition rejecting the Union relied on by the Respondent in withdrawing recognition from the Union. The judge therefore recommended dismissal of the complaint's 8(a)(3), (5), and (1) allegations in their entirety.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] On January 29, 1992, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a reply brief to the exceptions of the General Counsel.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accord with the Respondent's cross-exceptions, we correct certain factual errors in the judge's decision: (1) The appropriate unit of Case Cutlery employees was as described in the 1988 collective-bargaining agreement with the Union, not rephrased and modified in the complaint. (See fn. 1 judge's decision.) (2) The Respondent's new labor grade 3 included jobs from the predecessor's former classification 8 *and* the Hafter position from former classification 9. (3) There were no, rather than few, proven exceptions to the Respondent's policy of declining to rehire any former employee at more than one grade level lower than the level of the former employee's previous job.

Leone P. Paradise, Esq., for the General Counsel.
William G. Trumpeter, Esq. (Miller & Martin), of Chattanooga, Tennessee, for the Respondent.
William Rudis, of Concord, Connecticut, and *Norman Smith*, Jamestown, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Bradford, Pennsylvania, on September 26 and 27, 1991, based on an unfair labor practice charge filed on February 21, 1991, as amended on March 29, 1991, by Local Lodge #638, District Lodge #65, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union or the Charging Party), and a complaint issued by the Regional Director for Region 6 of the National Labor Relations Board (the Board) on May 31, 1991, as amended on August 13, 1991. The complaint alleges that Case Acquisition Corporation, d/b/a W. R. Case & Sons Cutlery Co. (Respondent or Case Acquisition) refused to hire certain employee/applicants for hire because of their union affiliation and activity and withdrew recognition from the Charging Party, in violation of Section 8(a)(3), (5), and (1) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS PRELIMINARY CONCLUSIONS OF LAW

Respondent, a corporation with an office and manufacturing facility located in Bradford, Pennsylvania, is engaged in the manufacture and nonretail sale of cutlery. Based on a projection of its business since about November 29, 1990, Respondent, in the course and conduct of its business operations, will annually purchase and receive at its Bradford, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

W. R. Case & Sons Cutlery Co. (Case Cutlery) was an old and well respected manufacturer of high quality household, military, and sporting knives. In recent years, it experienced serious economic problems and changed hands several times. In the fall of 1990, when it was owned by James Parker, it was placed in bankruptcy. In the course of the bankruptcy proceedings, the Respondent, Case Acquisition Corporation, purchased its assets. While the most valuable asset was the Case name, Case Acquisition decided to attempt to make a go of continuing knife production in the Bradford, Pennsylvania plant, hiring anew at least some of the Case Cutlery management and employees, in lieu of either moving the

plant or contracting out the manufacturing operations. Case Acquisition admits that it is the successor to Case Cutlery.

For about 50 years, the Union had represented the employees of Case Cutlery. At its peak in the early eighties, the work force was over 900; in November 1990 there were 132 unit employees.[1]

Respondent was aware of the Union's presence in the Case Cutlery facility before it acquired the plant. Walter Makin and Anthony Danias, president and vice president of the local lodge, respectively, traveled from Bradford to Chattanooga, Tennessee, to attend October and November 1990 hearings in the bankruptcy court. While there, they were introduced to representatives of the entity which became Case Acquisition and their presence was noted by the Court. In the second hearing, the Union was also represented by counsel. At that time, union counsel unsuccessfully sought a delay in the sale of the business for the purpose of putting together a union-sponsored employee buyout.

When Respondent first started up, Case Cutlery's chief executive officer, Herman McIntosh, and a manager, Ken Griffey, remained with it; they left in mid-December. Respondent did retain a number of the predecessor's supervisors, including Dale Clark, manufacturing superintendent, Erica Runyan, Thomas Russell, Fred Wickwire, Dave Souther, and Tamra Cousins.

B. *The Hiring*

1. Generally

Case Acquisition's purchase of Case Cutlery was completed on November 29, 1990.[2] On that day, a meeting was held in the plant where John ''Mel'' Armstrong, Case Acquisition's president and chief executive officer, was introduced to all of the employees. Reading from a prepared speech (R. Exh. 3), he told them that Case Acquisition had only acquired the assets, and not the liabilities, of Case Cutlery. With regard to their union contract and future employment, he said:

> We will also not be recognizing the current labor contract. Since this would be a new company and since there is uncertainty about future production plans, we will be giving out applications for employment at the end of this meeting.
>
> If you wish to apply, and we sure hope you will, please mail your application or drop it off at the personnel office by Monday morning at 9:00. We certainly plan to interview current Case employees before considering any outside applicants.
>
> You will be contacted to arrange for an interview if you choose to apply for work, but obviously at this time we have no idea how many people will be needed.
>
> If you do apply and are offered a job with the new company, it will be under different terms and conditions than those which exist today.
>
> At this time, we do not know what these are but you will be advised of these new terms and conditions if you are offered a job by the new company.

In preparing for the takeover, Respondent was aware that the wages and benefits at Case Cutlery were higher, by about $4.50 per hour, than those elsewhere in the industry. A business plan was prepared which, inter alia, set out the lower wage rates which the new management believed were necessary if they were to compete. It also consolidated the existing eight (classifications 3–10) narrowly drawn job classifications into five broader grades.

Under the collective-bargaining agreement, job classification 3 had started at $6.81 per hour and progressed over 27 months to $8.17. At the top of the scale, job classification 10 started at $10.39, reaching $13.83 per hour after 33 months.[3] New labor grade 1 included jobs from classifications 3, 4, and 5, paying $5.50 to $7; new labor grade 2 included positions from classifications 4–8 and paid from $5.90 to $7.96; new labor grade 3 was the former job classification 8, paying $7.20 to $9.13; new labor grade 4 was the former classification 9, it paid $8.35 to $9.75; and, the top grade 5 was the former job classification 10, paying $10.15 to $13.50.

On Saturday, December 1, a group of four supervisors met to review the existing employees, initially to bring back a skeleton crew to get the plant up and running. The committee consisted of Dale Clark, superintendent of manufacturing, and three supervisors, Fred Wickwire, Erica Runyan, and Dave Souther. According to the credibly offered and mutually corroborative testimony of Armstrong, Wickwire, and Runyan, they were charged with selecting the best, most productive employees, those who could work well with others. Additionally, they were directed not to discriminate against any employee on the basis of race, sex, age, or union activity or affiliation. Finally, they were instructed that, in order to avoid employing individuals who might become disgruntled, they should not bring back anyone at more than one pay grade below that at which he or she had previously worked.

This committee reviewed the permanent records maintained by the supervisors regarding each employee, particularly the Attendance, Tardy and Miscellaneous Reports (ATMs). They added their own comments concerning the employees' productivity, behavior, and attitudes to some of the ATMs. The files were separated into those immediately acceptable employees about whom there were no questions and those more questionable ones, to be reviewed further. Some employees were immediately excluded. Hiring was then done according to the jobs which needed to be filled, with little or no regard for seniority. Selected employees were interviewed on Monday and Tuesday, December 3 and

[1] The unit, as set out in the last (June 1988 to June 1991) collective-bargaining agreement included all of the Case Cutlery employees at its Bradford Township and Foster Township plants, excluding probationary employees, watchmen and janitors, department supervisors, shipping department employees, office employees, salesmen, executives, and truckdrivers. The General Counsel's complaint rephrased this unit, appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act, as follows:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Bradford, Pennsylvania facility; excluding guards, supervisors and professional employees as defined in the Act.

[2] All dates are between November 1990 and June 1991 unless otherwise specified.

[3] Jt. Exhs. 8 and 9 indicate that some recently hired Case Cutlery employees were in job classifications 1 and 2, at $7 and $7.96 per hour, respectively.

4, and approximately 80 were hired and began work between December 5 and 13. All but four of these fell into the three lowest grades; one person was hired at grade 4 and three were hired at grade 5. (As discussed infra, those three were from the maintenance department and had been selected by a different group of supervisors.) Each was paid at the top level for his or her grade.

The plant shut down over Christmas. There was no more hiring until January 14 when three grinders at labor grade 2 were put on.

While Case Cutlery had kept weekly efficiency reports on the direct labor employees, comparing their production against a standard, those efficiency reports had not been compiled or used by the new management in its hiring decisions prior to January 14. On about that date, however, such a compilation, showing the employees' efficiencies on a year-to-date basis, was readied. Armstrong instructed Clark that, henceforth, employees with efficiency ratings above 70 percent would be hired, by seniority, unless a good reason existed for not hiring a given individual. Fifty-two Case Cutlery employees, all meeting those criteria, were rehired between January 21 and the end of March.

At some point, management decided that all employees who were rehired before June 1, 1991, would receive credit for their length of service with Case Cutlery for the purpose of the 401(k) retirement plan and vacations. Anyone hired after that date would not be eligible for the 401(k) plan until January 1993. It was further decided that no former employees would be hired after June 1 in order to avoid having employees who might be disgruntled at the loss of their retirement and vacation benefits.[4]

Immediately prior to the June 1 cut-off, management looked at long-term older employees of Case Cutlery who were either marginal in efficiency or who had been satisfactory employees not yet recalled because of a lack of need for someone in their job classification. After checking with counsel, it was decided that individuals meeting those criteria, who had efficiency ratings of at least 65 percent, would be recalled. Three former employees, Richard Skillman, Vivian Bottorf, and Richard Salada, with seniority dating to 1959 or earlier, and efficiencies between 66 and 69 percent, were hired before June 1. All but Skillman were between 60 and 62 years of age; they had been in labor classifications 3 and 4 and were placed in new labor grade 1. Skillman, 43 years old but with 25 years of service at Case Cutlery, had been a labor grade 5; he was placed in new labor grade 2. Each took a cut in pay of between 65 cents per hour (Skillman) to $1.32 (Bottorf).

Also hired at that time were Virginia Kerstetter and Walter Makin. Kerstetter was 60 years of age with 16 years of seniority and an efficiency rating of 113 percent. Union Local Lodge President Walter Makin had been a master mechanic A, paid at the top of classification 10, $13.83. He was 54 and had 31 years of seniority (fourth longest among those recalled). As he was considered indirect labor, his efficiency had not been rated. He was recalled at the top of new grade 5, $13.50 per hour, the first grade 5 hired since December 10.

All the former Case Cutlery employees who were hired were given interviews first. Three union officers/stewards who are alleged as those discriminatorily denied rehire, and some other individuals with no outstanding union activity, were not called for interviews. According to Dale Clark, they did not interview any of those Case Cutlery employees who had been placed in a definite ''do not hire'' category during the initial review of ATM records or any of those whose efficiency ratings fell below 70 percent in the second wave of hiring.

In the course of the pre-June 1 hiring, nine were offered jobs and turned them down (Jt. Exh. 1(a)). Twenty-eight inactive employees (those laid off before November 29) made application and were rejected (Jt. Exh. 1(b)). Approximately 122 active and inactive employees were hired. (Jt. Exhs. 1(e) and (f).) Included in this group were five union officers or stewards, including Shirley Barrett, recording secretary and one of the most active adherents, and Walter Makin, who, as noted, was not rehired until late May.

Pursuant to Armstrong's direction, no former employees were hired after June 1, because of the possibility of ill-will among those who lost their seniority and seniority-related benefits.

Twenty-six active employees applied but were denied rehired. (Jt. Exhs. 1(c) and (d).) Included in this group were Local Lodge Vice President Anthony Danias, Steward and Local Lodge officer Susan Keller, and Steward Kenneth Van Curen. The General Counsel alleges that these three individuals were denied reinstatement, and that Makin's reinstatement was delayed, because of their union activities and affiliation.

The parties stipulated that since June 1 new employees have been hired and trained to perform jobs which the alleged discriminatees could perform and had performed in the past. It was also stipulated that all four of the alleged discriminatees had good attendance records and that their attendance was not an adverse factor in the Employer's decision not to hire them. All but one of the new hires came in at the lowest pay rates for labor grades 1 and 2. One individual was hired at the top of grade 5.

Turning now to the particulars with respect to the alleged discriminatees.

2. Walter Makin

Makin began his employment at Case Cutlery in 1959. He had experience throughout the plant, having worked in both production and indirect labor jobs. Makin had completed an extensive apprenticeship training program and, at the date of his termination was a master mechanic A, labor classification 10, at the top of Case Cutlery's pay scale. He made and repaired machinery, and he maintained and repaired the heating system and other plant equipment. He also instructed other employees in the grinding, milling, and drilling operations. Over the last 2 years, and as recently as early November, Makin's work was complimented by various supervisors, including Clark, Runyan, and Tom Russell. He had received no oral or written disciplinary warnings and had never been as-

[4] Counsel for the General Counsel questions the reasonableness and fairness of management's decision to avoid hiring back employees at substantially lower rates or with substantially diminished benefits. She also argues that there is insufficient evidence to show that such a policy actually existed, noting that no such policy was documented or explained to the employees. I find that Respondent offered credible testimony regarding the existence of such a policy and note that it was applied in a uniform manner.

signed a disciplinary suspension. However, the notes made on his ATM record, dated November 29, 1990, state:

> Termination Remarks: Did not work up to abilities, much wasted time, opinionated, difficulty in accepting others' ideas. Quality of work average. Quantity of Work—fair.

As indirect labor, he did not have an efficiency rating.

Makin had been a member of the Union throughout his employment. He had been the Local Lodge president for 5 years at the time of his termination and had also been president from 1975 to 1984. Prior to 1975, he had been the vice president. As president, he was chairman of the negotiating and safety committees and he had negotiated five collective-bargaining agreements with Respondent's predecessors. He also attended the monthly agenda meetings held between management and the Union, where problems were resolved before they became grievances. As noted, he and Anthony Danias attended the bankruptcy proceedings held in Tennessee in October and November. While they did not testify or personally take any positions on the disposition of the assets, their presence was noted by Respondent's representatives and the Union sought a delay in the proceedings for time to put together an employee buyout. The request for a delay was denied and the Union's position did not affect the price paid by Respondent for those assets.

In August, Makin questioned Supervisor Dave Souther about the transfer of two senior employees out of a work area while junior employees remained. This, he told Souther, was contrary to terms negotiated with the Company. Souther replied, according to Makin's uncontradicted testimony, ''If you are going to force me to stick to negotiated language, it is costing too damn much money to do that.''

Subsequently, in September or October, Makin objected to Dale Clark about the Employer's posting of weekly efficiency ratings. He said the Union objected to the public posting of information which could result in an employee's discipline. He offered to have the employee and his steward discuss any efficiency problems with the supervisor. Clark, he alleges, told him, ''That is the way it is going to be and if you are going to be so bull-headed about the posting of . . . the efficiencies, perhaps we would be better off without you here.'' Makin recalled filing a grievance over the postings; it fell through the cracks created by the bankruptcy filing and was never resolved. He did not mention filing any grievance over this alleged threat.

Clark recalled that Makin asked him to take down the postings; he refused and both men were adamant in their positions. He recalled no grievance and denied that he made any remark about the Company being better off without Makin if Makin was going to be that bullheaded. Had he made any such statement, he averred, Makin would have complained to the head of the personnel department.

Both Makin and Clark testified with credible demeanor. It is possible, given the tension in the plant stemming from the Company's tenuous economic condition, with bankruptcy proceedings underway, that such an intemperate remark, like Souther's comment a month earlier, was made. It is equally possible that something disparaging but less threatening was said or that, as indicated by the failure to make an issue of the alleged threat at that time, Makin simply brushed off whatever was said as unintentional hyperbole. Given this state of the record, particularly Makin's failure to complain at that time, I cannot find that Clark made the statement as Makin attributed it to him.

The first three employees brought back came from among the skilled maintenance workers supervised by Tom Russell. Russell, Clark, Griffey, and McIntosh made the selections. One master mechanic A, Makin's classification, was needed; Tom Wolff, who had been the group leader and who was given a much more favorable appraisal by the reviewing supervisors, was chosen. Also selected was Dick Sheeley, electrician A. Both had been at the top of labor grade 10 and were recalled at the top of new labor grade 5 at $13.50 per hour (88 cents and 33 cents per hour less than they had been making). The third man was William Burns, who was a maintenance machinist, labor grade 8. He was rehired to do the less skilled work and was placed in new job grade 3 at $9.13 per hour, 19 cents per hour less than his old rate. Although Makin could have done the work Burns was rehired to do, he was not selected to do it because of Respondent's policy of not rehiring employees at more than one pay level below what they had been earning. Makin was at Burns' level in 1985 and had risen two levels since then.

Similarly, Mark Stormer, formerly a grade 9, returned as a hafter, grade 3, in December, at $2.15 per hour less than he had been making. He subsequently bid successfully on a grade 3 trainee job in maintenance. His rehire was at the equivalent of one pay grade less than that at which he had been working. Neither Makin nor Martin Peterson, the other master mechanic A and like Makin a grade 10, was offered that maintenance job. Either of them could have done the work bid on by Stormer. Peterson, in fact, was never offered a position by Respondent.[5]

The General Counsel points to Respondent's rehire of Dick Young to indicate that it had no firm policy of refusing to hire an employee back at a much lower grade level and hourly rate. Young had been a tool-and-die maker A, labor grade 10, earning $13.50 per hour. He was hired back on February 4, in labor grade 4, at $9.75 per hour, the top of that scale and essentially equivalent to the old labor grade 9. Notwithstanding that Young took a substantial cut in pay, he was not reduced more than one labor grade, new grade 4 being the equivalent of old grade 9; his rehire was not contrary to the policy as claimed by Armstrong. Moreover, Russell, who was no longer employed by Respondent, testified without contradiction that Young was brought back because he was the only person qualified to fill an immediate need for a die repairman.

Counsel for the General Counsel also referred to Joint Exhibit 8 as showing that a total of 80 employees dropped three or more labor grades. Her analysis ignores the fact that the eight labor grades were consolidated into five with the greatest concentrations in the lower grades. The number assigned to the new labor grades is meaningless for the purposes of this comparison. The grades and pay rates assigned to these rehires show that while some of them returned at one grade level below what their former grade would have equated to (i.e, some former grade 9s returned as new grade 3s rather than as new grade 4s and some former grade 8s returned as new grade 2s rather than as new grade 3s), in fact, they did

[5] Like Makin, Peterson had received a negative termination report.

not lose more than the equivalent of one of the old labor grades when they were rehired. That was the criteria set by Armstrong.[6]

3. Anthony Danias

Anthony Danias was hired in 1971. He worked in the cabinet shop until that department closed in 1986, in subassembly and assembly into 1988 and then successfully bid on the material handler's position, which he held until his termination. As a material handler, he moved throughout the plant, delivering raw materials, moving parts and equipment, and removing waste and garbage. He was in labor grade 4, at $8.32 per hour.

Danias was a union member since 1972; since 1988, he had been the Union's vice president, chief steward, and member of the negotiating committee. As chief steward, he appointed stewards, investigated complaints, generally ''policed'' the contract, attended the agenda meetings, and handled grievances at the second through sixth steps. He was considered among the Union's most active adherents. As noted, he attended the bankruptcy proceedings along with Makin.

Danias submitted a timely application to Case Cutlery; he was never called for an interview or hired. According to Clark, Danias was rejected in the first round of applicant reviews because he was slow and hard to motivate. Management, he said, had received complaints from other employees about Danias' job performance and Danias' lack of industry was the subject of employee humor, including posters and visual jokes. Clark's description of Danias' performance was corroborated by Ralph Ward, his supervisor, and Tom Russell, supervisor of another department who observed Danias' work. Case Acquisition eliminated the material handler job and did not replace Danias in that position.[7]

Danias testified, without contradiction, that Clark had complimented him for a time-saving innovation in the material handler's job shortly after he assumed that position. Despite the complaints about his work, he was never suspended or given either an oral or written warning. However, in September 1989, Ward had told Danias that he was not satisfied with Danias' job performance, particularly with respect to compliance with the job priorities Ward had established. A written ''record of discussion'' was placed in Danias' file, memorializing this conversation (R. Exh. 2.) Danias acknowledged having disagreements with Clark over what work was within his job description and expected of him.

Clark did not discipline Danias, despite his dissatisfaction, because that was the function of Line Supervisor Ward. In general, Clark asserted, no formal discipline was issued to any of the employees in the last few years because, with the turmoil arising from Case Cutlery's declining economic position, management did not want to provoke grievances. The record does not contain evidence of discipline of other employees.

Respondent's witnesses denied that Danias' union activity figured into the decision not to hire him.

4. Susan Keller

Susan Keller was hired as an assembler in 1983. She worked in that capacity for 12 years and was a checker, labor grade 4, at $8.32 per hour, at the time of her termination. Keller submitted a timely application but was not hired or called for an interview.

Keller was third in seniority among the checkers. At least two of the less senior checkers, Goodsell and Pessia, were hired in the first hiring round. While there were no prepared year-to-date efficiency figures at that time, the subsequently prepared report indicates that they had efficiency ratings of approximately 70 and 59 percent, respectively. Keller, however, is shown in the subsequently prepared report as having a 95.69-percent efficiency rating.

Keller was a longtime union member and for the last 2 years had been the departmental steward in two departments. She was one of the four most active union member-stewards. As steward, she regularly handled employee complaints, dealt with the foremen about discipline, overtime, and safety and attended monthly agenda meetings with management. Twice in the summer of 1990, she said, she had talked supervisors out of issuing ''pink slips'' over employee efficiencies.

On one occasion in October 1990, when Keller adjusted a seniority dispute with Wickwire, Wickwire told her, ''Boy, I knew I was in trouble when I had to deal with you.'' She replied, ''Don't you forget it,'' and both laughed. On another occasion in the same month, she protested to Clark about the movement of employees without regard to their seniority. Clark told her that she should not get excited and should watch her blood pressure. He said that there was a major problem and asked her to work with him on it. She agreed, as long as he went by the book. Keller acknowledged that the ''blood pressure'' remark was occasioned by her voice, ''that carries.'' She also admitted that she sometimes yells and curses, but denied doing so in the course of her grievance handling.

Clark testified with respect to what appears to have been the last incident. He had, with Makin's approval, transferred an employee out of seniority. Keller, he said, became very upset and was yelling and screaming, questioning why the employee, who she said was not qualified, was put on a particular job. Clark spoke with Makin, and Makin allegedly agreed that he had problems with Keller. Makin described Clark as exaggerating the extent of Keller's upset, but admitted finding her ''a little bit upset about'' the issue.

According to Clark, Keller was excluded in the first round of considerations because she was loud and disruptive in the department. In that review, the committee entered the following notation on her ATM record:

> Personality immature, impulsive, indecisive, unstable. Opinionated-difficulty in accepting other ideas.

[6] There do appear to be four individuals, James DeFilippo, Richard Fowler, Charles Little, and Karen Stebbins, who had been in former labor grade 9 but who were hired back in new labor grade 2 at $2.32 less than their old rate. These were not alluded to by counsel for the General Counsel in the hearing or brief and no explanation has been offered by Respondent.

[7] When, on January 25, the Respondent furnished the Union with a list of its new labor grades and wage rates, correlated with the job classifications within each grade, it included a ''material handler'' job classification among those at labor grade 1, paying from the minimum of $5.50 to $7 per hour. There is no evidence that anyone was ever hired to fill such a position. (Jt. Exhs. 6 and 17.)

Clark agreed with this evaluation and characterized her personality as like ''Jekyll and Hyde.'' He said that her decisions, whether on union or personal matters, were immature and did not make sense. She got upset, he said, without learning the facts and she tended to blame others. Clark testified that Keller's reputation among her fellow employees, a factor which was considered, was that she was ''overbearing.''

Respondent cited several incidents to demonstrate Keller's alleged failings. In January 1990, she had put in for a June vacation and requested that her paycheck be available a day early to accommodate her vacation plans. The Employer had made such accommodations for others and promised to do the same for her. Keller reminded her supervisor of the request several times before she was to leave on vacation. However, when she went to get the check, on the Thursday she had planned to leave, it was not there. She swore at one of the office employees (''That is really God damn nice!'') and it was reported to Clark that she was in her department, very upset, crying, and screaming while 15 other employees were supposed to be working. Clark went to her, explained why the check was not ready and, to calm her down, offered to lend her money from his own pocket. She rejected his offer, saying that she wasn't going to borrow ''any God damn money from anybody in here'' and didn't ''want his f—king money.'' She subsequently arranged for a family member to wire her the funds and left on her vacation without picking up her check.

Clark also understood that there was a problem between Keller and another employee in her department, Adeline Pearce, involving Keller's cigarette smoke. As Clark understood it, Pearce repeatedly complained that Keller would place her fan so as to blow smoke toward Pearce. Keller denied this, asserting that Pearce had been disturbed by the smoking of another employee, that Runyan had asked Keller to resolve the conflict, and that she had done so in such a way as to leave the two employees as good friends. Runyan did not mention this incident and Pearce did not testify. Keller was never disciplined for causing cigarette smoke to blow toward another employee.

Runyan testified that she had been Keller's supervisor for 5 years. They got along ''pretty good,'' she testified, and worked well together. However, repeating Clark's description of Keller as having a ''Dr. Jekyll and Mr. Hyde'' personality, she stated that she did not want to hire Keller back. Keller's moods, she claimed, bothered other workers more than they did her, and when Keller was in a bad mood, it would adversely affect the production of other employees in the department. She described several incidents in which Keller had allegedly upset her fellow employees.[8]

Runyan also described an incident wherein Keller had a dispute with Ken Burkenstack, the quality control manager, over the standards to be applied in passing knives for shipment. Keller, Runyan stated, would not accept Burkenstack's criteria and, at one point, said that she would no longer talk with him. However, even after saying this, she continued to go to Burkenstack with quality control questions. When asked whether she had ever stopped talking to Burkenstack, Keller answered, ''Not really, no.'' She said that they would discuss quality control questions at least once a day; sometimes she would agree with him on passing an item, sometimes he would agree with her. Burkenstack, no longer employed by Respondent, did not testify.

Supervisor Tamra Cousins described an incident in the summer of 1990, arising over the use of an intake fan. The employees in Cousins' department wanted the fan turned off because it made their section too cold; the employees in the hafting department wanted it kept on because their department became hot and stuffy without it. The controls were in the maintenance department and, repeatedly, Keller went to maintenance to have them turned on. Shortly after she would do so, someone else would turn them off. According to Cousins, Keller ''barged'' in to her office, interrupting a phone conversation, and started yelling, in terms loud and vulgar, about the fans being turned off. Keller testified that when she went in to Cousins' office she did not notice that Cousins was on the phone; when she did, she told Cousins that she would wait. She admits asking Cousins, ''Who the hell was monkeying with the fans?'' and stating that Makin had said that she was to leave her ''damn hands'' off of them. She denied other obscene statements attributed to her by Cousins.

The foregoing incidents involve credibility less than perception. Keller admits that she has a ''voice that carries'' and does not deny swearing and, on occasion, getting upset. She denied that the incidents occurred or were as bad as the supervisors recalled them. I conclude that there were a number of incidents involving Keller; they may not have been quite as bad as they were described by others, but they were louder and more vulgar than Keller thought them to be.

Keller was never disciplined or counseled regarding either her work or her conduct in the plant. Erica Runyan, her supervisor, had regularly complimented her work performance, with such statements as, ''I wish I had more people like you.'' She was also complimented on her completion of a particular order by Clark, who noted that it would not have gotten done without her. She was not disciplined, Clark said, because, given the Company's economic problems, management sought to avoid additional problems.

Shirley Barrett was another union officer-steward who worked in Runyan's department; she was also considered among the most active of the union members. Barrett was rehired in the first group of returnees, December 4, 1990.

5. Kenneth Van Curen

Kenneth Van Curen had occupied various production jobs since commencing his employment at Case Cutlery in 1970. For the 9 months before the November 29 termination, he had been a straightener (cutler), labor grade 5, at $8.61 per hour.

Van Curen, a union member throughout his employment, had been a steward on the night shift in 1988. In about August 1990, Makin appointed him to be a steward in department 519. Plant Superintendent Clark and Personnel Director Mawn were both informed of his appointment. Clark did not recall that he was a steward and understood that the steward in that department was Scott Freer.[9]

[8] The incidents, involving Rose Hvizkzak and Nancy Bacha, were minor and subject to differing interpretations by third persons, such as Runyan. In each, Keller denied having upset the other employee; Hvizkzak and Bacha did not testify.

[9] Freer was rehired on January 29.

In September, when rumors of an imminent sale of the business were prevalent, Van Curen pointed out to Clark that a less senior employee was doing work which should have gone to someone more senior. Clark replied, ''Don't worry about it, none of you will be here for long.'' Van Curen connected the statement to the rumors and did not take it personally. The following day a more senior employee was switched back into that job. Van Curen had no recollection of any other activity which might be deemed union related.

Van Curen submitted a timely application but was neither interviewed nor hired. His record was reviewed on December 1 and Supervisor Wickwire noted on his ATM record, ''Poor utilization of time—efficiency—also poor attitude. No drive, ambition limited.'' That record reflected that a record of discussion had been entered into his personnel file on August 14, 1990, wherein he had been told that he ''needs to utilize his time before breaks, lunchtime and at the end of the shift. Work until the bells.'' He was excluded on the first round of hiring, but not as one who would definitely not be hired.

Van Curen had never been suspended, had not received any disciplinary warnings in the past 10 years, and had received a number of merit increases. In his last job performance review, in January 1990, Clark had rated him as above average in dependability and cooperation but below average in productivity. The year-to-date efficiency report (not available when the initial review was made) indicates an average efficiency of 37.90 percent for Van Curen. That rating eliminated him from subsequent consideration for hire.

C. *Recognition and Withdrawal*

As noted, Respondent did all of its hiring from among the Case Cutlery employees until June 1, 1991. By December 13, it had hired 80 of those employees and had maintained much of the supervisory staff, had resumed production of the same products, for the same customers, in the same plant and with the same equipment.

On December 19, the Union, claiming that Case Acquisition was both an alter ego and successor to Case Cutlery, submitted a written demand for recognition and application of the collective-bargaining agreement. Armstrong referred the demand to counsel, and so notified the Union.

On January 7, counsel for Respondent wrote the Union, acknowledging successorship but denying alter ego status. On behalf of Respondent, he agreed to recognize the Union, expressly basing that recognition on the presumption of continued majority status and without any independent proof of majority support. The Union was told that the terms and conditions of employment which Respondent had unilaterally established on acquiring the assets would be continued until changed through negotiations or after impasse. Thereafter, the Union requested certain information for negotiations, that information was furnished and plans were made to begin bargaining.

On February 13, however, Respondent's counsel withdrew the recognition previously granted, stating that Respondent had ''received objective evidence that a large majority of our employees no longer desire to be represented by your organization.'' It is not disputed that the Employer had received a petition to that effect signed by a majority of its employees.

D. *Analysis and Conclusions*

1. The alleged discriminatory refusals to hire

The General Counsel bears the initial burden of establishing a prima facie case of discriminatory motivation for the refusals to hire, or to hire earlier, the alleged discriminatees. *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Such a prima facie case is made out by proof of employee union activity, along with employer knowledge of, and employer animus toward, it. *Associated Milk Producers*, 259 NLRB 1033 (1982).

In the instant case, the union activity of Makin, Danias, and Keller was overt and substantial. Similarly clear was the Employer's knowledge of that activity. Van Curen's union activity was of a much lower level, a recent appointment as a departmental steward, following an earlier stint in that role on another shift, and a single conversation with a member of management in the nature of protected or union activity. His appointment was made known to both the personnel director and the plant superintendent; knowledge was thus established.[10]

The more difficult question is whether the General Counsel has proven union animus. The only evidence to which counsel for the General Counsel alludes is: (1) Clark's remark to Makin in September or October when Makin protested the posting of the efficiency reports; (2) Armstrong's testimony regarding the need to reduce labor costs in order to be competitive; and (3) Armstrong's remarks at the introductory meeting in which he told the employees that Case Acquisition would not recognize the contract and, in inviting all existing employees to submit applications for employment with the new concern, stated that ''there is uncertainty about future production plans.'' I have found that the former did not occur as Makin described it. Armstrong's statements, admittedly made, are entirely innocent of any taint of animus. Armstrong made no threat, even by implication, at the November meeting. He stated Respondent's legal right under the authority of *Burns*,[11] and both his testimony about reducing costs and Respondent's refusal to adopt the existing collective-bargaining agreement reflect an economic imperative as Armstrong saw it. That future production plans were uncertain was a truism, self-evident from the nature of the Company's acquisition, through the bankruptcy court.

The essential premise of the General Counsel's case is that the Employer was motivated by an intention to undermine and eliminate the Union by removing its strongest supporters. The facts, particularly that it placed itself in such an obvious successorship position, hired a majority of the Union's officers and stewards and recognized the Union so readily, belie

[10] Contrary to the contention of the General Counsel, I do not find Clark's failure to recall that Van Curen was a steward to be indicative of a guilty mind. Given Van Curen's limited activity and the ongoing threat to the survival of the business which was pressing on everyone's minds, such a failure is not incredible. Moreover, while Van Curen pointed out a seniority problem to Clark, which was apparently corrected the following day, it is stretching to call this the settlement of a contractual dispute between Van Curen and Clark. The evidence does not show any causal connection, other than temporal, between their brief conversation and the change in assignments the following day.

[11] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

such an intent. Respondent was represented by able and experienced labor counsel. Had it intended to operate nonunion, steps could have been taken to prevent, or at least make more questionable, successorship status. Those steps were not taken. Rather, Respondent invited all existing employees to apply, hired only from among the predecessor's employees for more than 6 months, maintained wages reasonably close to those paid by its predecessor, thus attracting applications from most of the predecessor's employees, and satisfied all of the other successorship elements.

More significantly, when faced with the demand for recognition which the foregoing facts made inevitable, Respondent admitted its role as a successor, granted recognition without hesitation, provided the Union with information necessary for collective bargaining and scheduled the opening of negotiations. Respondent did not seek to delay recognition by insisting on litigating successorship. It was only when faced with a unequivocal expression of majority opposition to continued representation that it withdrew recognition.

The General Counsel's premise requires a conclusion that Respondent would have been able to forecast that the allegedly discriminatory actions would bring about disaffection with the Union. I cannot find that Respondent was that prescient. In this regard, I note that at the time of the employees' petition, Respondent was still in a hiring mode. Some union officers had already been hired and the employees could not have known whether or not the remaining officers were going to be hired or ultimately denied rehire. Moreover, Respondent had recognized the Union and expressed a willingness to bargain. That was hardly a set of circumstances calculated to undermine union support.

Finally, counsel for the General Counsel argues that weaknesses in the Employer's justifications for refusing to hire the four establish its animus.[12]

In the November meeting, Respondent implied that all applicants would be interviewed; counsel for the General Counsel pointed out that three of these four individuals were never called in for interviews and Makin was not interviewed until shortly before he was rehired in late May. However, the record reflects that no applicants were interviewed until shortly before they were to be hired and that other applicants, those deemed unacceptable for reemployment, were never called for interviews. There was no discrimination in the granting of preemployment interviews.

The record reflects that Respondent hired only one master mechanic A, Tom Wolff, in all the months prior to Makin's reemployment. Wolff was the group leader of the group in which Makin had worked; he was also evaluated most favorably when each of the employees was reviewed for possible rehire.[13] Preference given to the group leader, who would generally be the most respected individual in a classification, is logical and unsupportive of any inference of discrimination. There were no other positions, in Makin's job classification and at his grade level, until May and, when such an opening arose, it was offered to him.

Respondent contends that it did not hire Makin earlier because of a policy precluding the return of employees at more than one grade level below that which they had formerly been employed. That policy, which Respondent followed in all but a few isolated instances,[14] harshly affected some employees, including Makin.

Respondent's assumption that employees would resent offers of lower paying jobs or become disgruntled if they accepted such an offer may have been presumptuous or burdensome in a tight job market, as counsel for the General Counsel implies. However, the avoidance of overly qualified or previously more highly paid employees is an accepted hiring practice. See *Parcinski v. Outlet Co.*, 674 F.2d 34, 37 (2d Cir. 1982); *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). These cases, arising under the Age Discrimination in Employment Act, 29 U.S.C.A. § § 621–634, find such policies to be legitimate business decisions, permissible in the context of age discrimination allegations. As Respondent argues, it is not for the Board to second-guess such business judgments. *Allbritton Communications*, 271 NLRB 201, 204 (1984), enfd. 766 F.2d 812 (3d Cir. 1975).[15]

The counsel for the General Counsel argues that, contrary to the pictures painted of them by Respondent, Danias, Keller, and Van Curen were good, productive employees and that the failings attributed to them were pretextual. In particular, it is argued, had they been as bad as Respondent claimed, they would have suffered some measure of discipline during their employment. This argument would be persuasive if the record indicated that Respondent had a practice of disciplining employees with warnings and suspensions. The record, however, is devoid of any evidence of such a practice; Respondent rarely, if ever, went beyond the occasional use of a record of discussion.

With respect to Danias and Van Curen, the record amply supports Respondent's contentions. There was no contradiction of the testimony regarding the perception of Danias by both supervision and his fellow employees as one lacking in industry. Even Danias acknowledges arguing with supervision about what work he was expected to do within his job description. There is also no evidence disputing Respondent's claim that no one was hired to fill the material handler job

[12] Examination of these contentions is coextensive with the review of those justifications which would be required were I to find that the General Counsel had established a prima facie case. It is similarly coextensive with consideration of whether any of these individuals was discriminatorily denied employment because of his or her individual union activity, apart from what I have referred to as the General Counsel's principal premise.

[13] Counsel for the General Counsel also argues that such phrases in the appraisals of Makin and Keller as ''opinionated'' and ''difficulty in accepting others' ideas'' was a code for objectionable union activist. The record establishes that not all the union's officers and stewards were described in such terms; it further reflects that other employees, with no known union connections, were described with the same or similar terms. The verbiage of the final appraisals warrants no conclusion that Respondent was using the reviews to mark and thereby exclude union officers or activists.

[14] In those few instances, the employees suffered wage reductions ($2.32 per hour) which were substantially less than Makin would have incurred had he been called back in new classification 3 or 4. He would have had his pay reduced by either $4.70 or $4.08 per hour, respectively.

[15] This rationale applies, with equal force, to Respondent's decision to cut off the rehiring of Case Cutlery employees after June 1. It may well be that had it not adopted such a policy, it could have secured employees who would have been immediately productive, without the need for extensive training. It might also have rehired employees who had not previously been particularly productive, such as Danias and Van Curen, and/or who would have quickly become disgruntled by their reduced pay and benefits.

which he had occupied. Similarly, the record, particularly the year-to-date efficiency record, amply supports Respondent's contentions and opinion regarding Van Curen.

Susan Keller presents the most difficult case. She was clearly an highly efficient employee, praised for her own work. In terms of productivity, she was the kind of employee Respondent was seeking in its new work force. She was, however, loud, aggressive, and emotional in her dealings with others, whether acting on her own behalf or in a representative capacity. Her emotional outburst when confronted with a delay in providing a promised early paycheck amply supports management's perception of her. Moreover, she was perceived by supervision as impeding the productivity of others by her demeanor; that perception, whether fully warranted or not, was real and, I find, the motivating factor in failing to offer her employment. Given the absence of animus, particularly any evidence which would indicate that Respondent was inclined to violate the Act in order to avoid dealing with the Union generally or with Keller as its steward in particular, I am compelled to find that Respondent would have refused to hire Keller whether or not she had engaged in union activity.

As counsel for the General Counsel argues, the refusal to hire three of the four most active union adherents, including the two top local officers, is ''deeply suspect.'' However, in light of the absence of evidence of animus, indeed in light of facts negating animus, and the existence of valid business justifications for declining or delaying their hire, that suspicion does not rise to the level of proof required to establish discriminatory conduct. *Gateway Equipment Co*., 303 NLRB 340 (1991). Accordingly, I shall recommend that the 8(a)(3) allegations be dismissed.

2. The withdrawal of recognition

Having found no unfair labor practices tainting the Employer's objectively supported good-faith doubt of the Union's majority status, I further find that its withdrawal of recognition was lawful. I shall therefore recommend dismissal of the 8(a)(5) allegation as well.

CONCLUSION OF LAW

Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed in its entirety.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.